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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

DRAFTON LARNELL BUNCH,

Defendant and Appellant.

D052519

(Super. Ct. No. SCD200878)

APPEAL from a judgment of the Superior Court of San Diego County, Roger W. Krauel, Judge. Reversed.

Police arrested defendant Drafton Larnell Bunch in an undercover drug operation. A jury convicted him of selling cocaine base (Health & Saf. Code, § 11352, subd. (a); count 1)<sup>1</sup> and possessing cocaine base for sale (§ 11351.5; count 2). The 10-year sentence imposed by the court included two three-year enhancements based on Bunch's admission in bifurcated, nonjury proceedings that he had "those prior convictions" as alleged in the information. In Bunch's first appeal, this court vacated the sentence,

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<sup>1</sup> Undesignated statutory references are to the Health and Safety Code.

concluding that there was insufficient evidence to support the court's finding that the specific enhancement allegations were true. (*People v. Bunch* (Oct. 24, 2007, D050138) [nonpub. opn.].)

On remand, the trial court conducted a bench trial to prove the prior convictions. After hearing the evidence and reviewing the documents, the court found that the two section 11370.2, subdivision (a) allegations were "proven and true."<sup>2</sup> Once again, it sentenced Bunch to 10 years in prison: the middle term of four years in count 1; the middle term of four years in count 2, stayed pursuant to Penal Code section 654; and two three-year enhancements pursuant to section 11370.2.

In his second appeal, Bunch argues the court erred in failing to obtain a waiver of jury trial on the prior drug-related convictions before making its true findings and resentencing him on the section 11370.2 enhancements. We agree that the court erred in conducting the bench trial without a jury waiver. Accordingly, we reverse the true findings, vacate the sentence, and remand for a second trial on the section 11370.2, subdivision (a) priors.

## FACTUAL AND PROCEDURAL BACKGROUND

The court opened the remand proceedings by stating: "We are here for the bench trial to prove the prior allegations." The prosecutor responded, "Yes, Your Honor," and

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<sup>2</sup> Section 11370.2, subdivision (a) provides: "Any person convicted of a violation of, or of a conspiracy to violate, Section 11351, 11351.5, or 11352 shall receive, in addition to any other punishment authorized by law, including Section 667.5 of the Penal Code, a full, separate, and consecutive three-year term for each prior felony conviction of, or for each prior felony conviction of conspiracy to violate, Section 11351, 11351.5, 11352, 11378, 11378.5, 11379, 11379.5, 11379.6, 11380, 11380.5, or 11383, whether or not the prior conviction resulted in a term of imprisonment."

defense counsel said, "That's correct." The court did not request a new waiver of jury trial on the priors.

The information alleged that prior to the commission of the offenses alleged in counts 1 and 2, Bunch was convicted of three offenses within the meaning of section 11370.2, subdivision (a): (1) violation of section 11352 in case No. SCD170999; (2) violation of section 11351.5 in case No. SCD170999; and (3) violation of section 11352 in case No. SCD157651. The prosecution introduced 13 pages of documents relating to case No. SCD170999 and 30 pages of documents relating to case No. SCD157651. Included in each set of documents was the information, verdict, and abstract of judgment. The prosecution also introduced copies of fingerprint cards, Bunch's chronological movement history, and a photograph provided by the Department of Corrections and Rehabilitation.

Defense counsel did not object to admission of the documents offered by the prosecution. Nor did he cross-examine the prosecution's fingerprint expert who testified that Bunch was the person identified in the court and prison documents. The defense rested without introducing any evidence to challenge the prosecution's case. The court issued its true findings and immediately sentenced Bunch to the 10-year term.

## DISCUSSION

Bunch argues he is entitled to a new sentencing hearing because on remand the court made true findings on the section 11370.2 allegations without obtaining his waiver of jury trial. Bunch contends that denial of the right to jury trial constitutes structural

error and is not subject to harmless error analysis on appeal. We agree that Bunch is entitled to remand for a new trial on the priors.

The specific issue in this case is whether waiver of a jury in his first trial on the prior conviction allegations carried over to his new trial on the priors after this court reversed the true findings and remanded on grounds of insufficient evidence. Two published cases address the issue.

The first case, *People v. Solis* (1998) 66 Cal.App.4th 62 (*Solis*), holds that a jury trial waiver applies only to the first trial and the trial court must obtain a new waiver before proceeding without a jury on remand. (*Id.* at p. 67.) In *Solis*, the defendant waived the right to a jury and was convicted of drug-related offenses in his first trial. On appeal, the court found insufficient probable cause to support the search warrant used to obtain evidence relating to some of the charged offenses. It concluded that the court should have granted the defendant's suppression motion as to those offenses. The appellate court remanded the case to allow the trial court to reconsider the defendant's motion to suppress evidence collected in a separate search related to other charged offenses. (*Id.* at p. 64.) The trial court reconsidered the matter, ignoring defense counsel's suggestion that a new waiver was required. (*Id.* at p. 65.) It denied the suppression motion and found the defendant guilty of the remaining offenses. (*Ibid.*)

In the second appeal, the *Solis* court concluded that the defendant's first jury waiver applied only to his first trial. It reversed the convictions resulting from defendant's second trial on grounds they were obtained in violation of his constitutional rights. (*Solis, supra*, 66 Cal.App.4th at p. 67.) Relying on federal authority, the *Solis*

court highlighted two well-established principles. First, "[t]he right of trial by jury in cases at law, whether in a civil or criminal case, is a high and sacred constitutional right in Anglo-Saxon jurisprudence, and is expressly guaranteed by the United States Constitution." (Id. at pp. 65-66.) Second, "[a] stipulation for the waiver of such a right should . . . be strictly construed in favor of the preservation of the right." (Id. at p. 66.) The court reasoned that a defendant waiving his right to jury trial in one case could not be presumed to be aware of a possible later trial to which his waiver would apply. Indeed, it would be reasonable to suppose that such a defendant, facing a second trial, would not submit the matter to the same judge who convicted him in the first for reasons of possible bias. (Id. at pp. 66-67.)

The second case, *People v. Smith* (2005) 132 Cal.App.4th 924 (*Smith*), distinguishes *Solis* and holds that a jury waiver *does* carry over if the second trial results from a mistrial rather than "appellate intervention." (Id. at pp. 933, 936.) The *Smith* court explained that its conclusion flowed "from rational presumptions about the scope of defendant's consent to waive his jury trial rights. Defendant did not consent to the mere commencement of a court trial in this case. He consented to have the court hear *and decide* the entire case. The mistrial *interrupted* the proceeding to which defendant had already agreed. Unlike other circumstances in which it might be argued that the defendant did not consent to a second court trial, the *completion* of a court trial following a mistrial in no manner exceeds the scope of defendant's original consent." (Id. at p. 936.) The appellate court noted that defendant took no action to withdraw his consent to a court trial until his appeal. It found that defendant's silence in open court despite

defense counsel's acknowledgement of the issue was "strong evidence that [defendant] in fact reconsidered his jury trial waiver and reached an informed and voluntary decision not to withdraw it before the second trial." (*Id.* at p. 935.)

Here, as in *Solis*, Bunch's second trial on the section 11370.2 drug-related priors occurred after "appellate intervention" and remand. As *Smith* explains, Bunch's earlier consent to court trial applied only to the first trial, which concluded when the court made its true findings and sentenced Bunch. Moreover, the trial court's jurisdiction over the first trial ended when Bunch filed his notice of appeal. Thus, at the time of remand for a second trial on the priors, Bunch's original waiver was not in place for him to withdraw. We therefore conclude that the court erred in retrying Bunch on the drug-related priors without obtaining his waiver of jury trial.

The People argue that the error in this case is subject to harmless error analysis because: (1) the right to jury trial on prior convictions is statutory (*People v. Mosby* (2004) 33 Cal.4th 353, 360); and (2) denial of the right to jury trial on prior convictions is not among the limited circumstances amounting to structural error (see *Washington v. Recuenco* (2006) 548 U.S. 212, 218-219). The People contend that the error was harmless because "[t]he plethora of documentary evidence produced by [them] at the bench trial in this case was presumably highly reliable -- and amounted to overwhelming -- evidence of the truth of the prior conviction and enhancement allegations." Assuming that denial of the right to jury trial is subject to analysis under *Chapman v. California* (1967) 386 U.S. 18, 26, we reject the claim that the trial court's error was harmless beyond a reasonable doubt. As the court observed in *Solis*, it is reasonable to suppose

that if given the choice, a defendant facing a second trial on remand would not submit the matter to the same judge who ruled against him in the first trial. (*Solis, supra*, 66 Cal.App.4th at pp. 66-67.) Whether Bunch would have preferred to have a jury decide the truth of the section 11370.2 allegations in the circumstances of this case was a matter for him to decide. The trial court deprived him of that right.

#### DISPOSITION

The true findings on the section 11370.2, subdivision (a) allegations are reversed, the sentence vacated, and the cause remanded for a new trial on the priors and for resentencing. The judgment is affirmed in all other respects.

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McCONNELL, P. J.

WE CONCUR:

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HUFFMAN, J.

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O'ROURKE, J.